

Arbitration | Adjudication | Conciliation | Mediation

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Resolution

# Adjudication in Ireland, context and recent case law




**Adjudication**  
Society

Adjudication Society Annual Conference – 20 November 2024

# Construction Contracts Act 2013 (CCA 2013)

- The CCA 2013 came into force on 25 July 2016, eight years ago.
- The long title is '*An Act to regulate payments under construction contracts and to provide for related matters.*'
- Comprises 13 pages, with 12 Sections and 1 Schedule.
- Minimum of activity in the first two years, as could be expected.
- Its serves primarily an Act to regulate payments within which there are provisions for adjudication.
- Section 6 details the '*Right to refer payment disputes to adjudication.*'
- Similar to, but not the same as the HGCRA - there are notable differences.
- There has been a broad interpretation of the definition of '*payment dispute*' – is the dispute essentially about money?



Number 34 of 2013

CONSTRUCTION CONTRACTS ACT 2013

ARRANGEMENT OF SECTIONS

Section

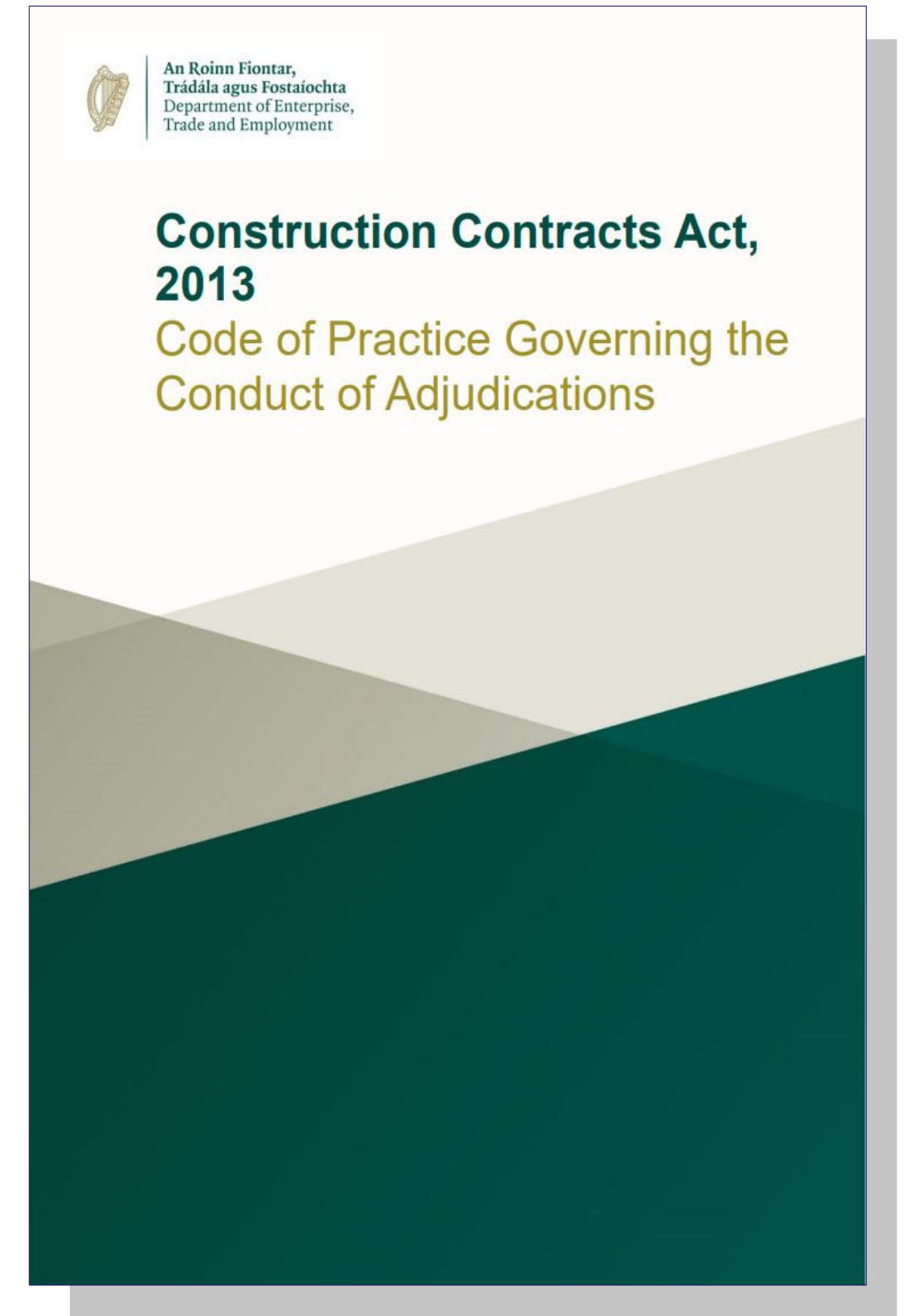
1. Interpretation.
2. Construction contracts: exceptions, etc.
3. Payments under construction contracts.
4. Payment claim notices.
5. Right to suspend work for non-payment.
6. Right to refer payment disputes to adjudication.
7. Right to suspend work for failure to comply with adjudicator's decision.
8. Selection of panel of adjudicators.
9. Code of practice for adjudication.
10. Delivery of notices, etc.
11. Expenses.
12. Short title and commencement.

SCHEDULE

PROVISIONS TO APPLY TO MATTERS REGARDING PAYMENTS

# Code of Practice

- The necessity and later publication of the Code of Practice in 2016 delayed the implementation of the CCA 2013.
- The Code of Practice, comprising 11 pages with 39 paragraphs, provides practical guidance and includes the requirement to submit anonymised data on each adjudication case.
- 30 years ago, the Latham report 'Constructing the team' called for a similar Code in support of the HGCRA 1996.
- The Code sets out:
  - Definitions and Preliminaries
  - Adjudicator responsibilities
  - Party agreed appointment of an adjudicator
  - Appointment of an adjudicator by the Chair of the Ministers panel
  - Referral of a payment dispute
  - Adjudication procedures and decision
  - Reporting on completed adjudication cases



# Adjudication case law

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- *McGill Construction Limited and Blue Whisp Limited* [2024] IEHC 205.
- *K&J Townmore Construction Limited, Damien Keogh and Desland (Mechanical) Limited T/A Cobec Engineering Group* [2023] 874 JR.
- *DNCF Limited and Genus Homes Limited* [2023] IEHC 40.
- *McGurran Civils ROI Limited and K&J Townmore Construction Limited* [2023] IEHC 355.
- *Western Excavations and Ground Works Limited and Glenman Corporation Limited* [2022] 165 MCA.
- *John Paul Construction Limited and Tipperary Co-Operative Creamery Limited* [2022] 165 MCA.
- *Aakon Construction Services Limited and Pure Fitout Associated Limited* [2021] 161 MCA.
- *Kevin O'Donovan and The Cork County Committee of the Gaelic Athletic Association and Nael G. Bunni and James Bridgeman and OCS One Complete Solution Limited* [2021] IEHC 575.
- *Principal Construction Limited and Beneavin Contractors Limited* [2021] MCA 199.
- *Construgomes & Carlos Gomes SA and Dragados Ireland Limited, BAM Civil Engineering and Banco BPI SA* [2021] IEHC 79. (Adjudication discussed but was not the substantial issue).
- *Gravity Construction Limited and Total Highway Maintenance Limited* [2021] IEHC 19.



# Comparison with the law of England and Wales

- The CCA 2013 has many similarities to the HGCRA 1996, however the Courts of Ireland have advised:

*“There is an understandable temptation for practitioners and judges in this jurisdiction to borrow from this extensive learning when interpreting and applying the Construction Contracts Act 2013. The case law from England and Wales must, however, be approached with a degree of caution. This is because there are significant differences between the legislative approaches adopted in the two jurisdictions.”<sup>(1)</sup>*

*There are also significant differences in the procedure governing the enforcement of an adjudicator’s decision. These distinctions are all too easy to miss in that many of the concepts underlying the UK legislation seem familiar to us.”<sup>(2)</sup>*



<sup>(1)</sup> *Aakon Construction Services and Pure Fitout Associated* [2021] 161 MCA at 21.

<sup>(2)</sup> *Ibid* at 41.

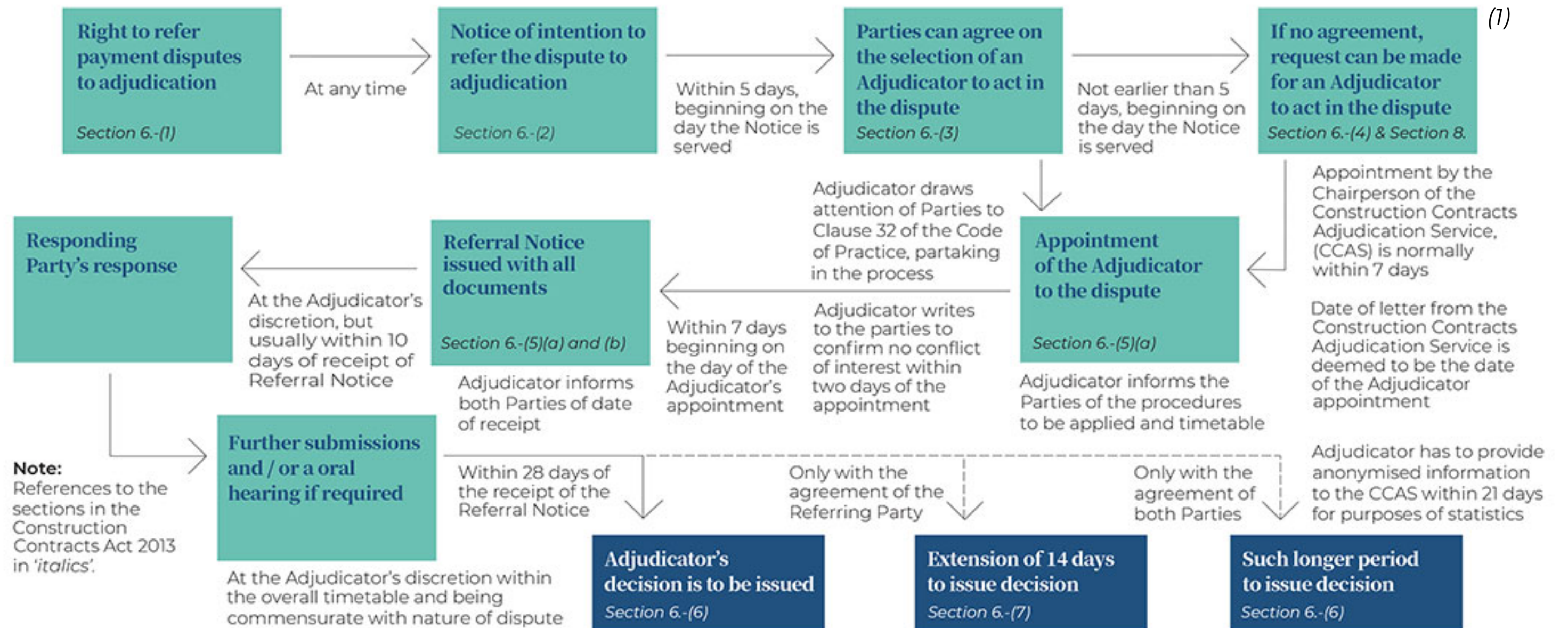


# Adjudication procedure

- There are some small but important differences in the adjudication procedure between the CCA 2013 and the HGCRA 1996, including:

- In the CCA 2013 there is no 'Day 0', as in the HGCRA 1996, Section 116(2).

- In the CCA 2013 there is no public or bank holiday time exclusion, as in the HGCRA 1996, Section 116(3).



# Status of the ‘Notice of intention to refer’

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- The Courts advise that the a more liberal approach to a strict framing of a dispute under the ‘Notice of intention to refer’ will be permissible under the CCA 2013, where:

*“...the statutory code of practice does not say that the details of the dispute are confined to those set out in the notice.”<sup>(1)</sup>*

*“...it should not automatically be assumed that a notice of intention to refer has the same canonical status as a “notice of adjudication” has under the UK legislation.”<sup>(2)</sup>*

*“Provided always that the notice of intention to refer identifies the gravamen of the payment dispute, and, in particular, identifies the construction contract; the parties; the site address; the payment claim notice; the response, if any, made to the payment claim notice; and the sum claimed, then the refinement of legal argument in the referral will normally be permissible.”<sup>(3)</sup>*

*“The litmus test in assessing the adequacy of a notice of intention to refer must be whether the alleged defects impinged upon the responding party’s ability to defend the claim against it.”<sup>(4)</sup>*

<sup>(1)</sup> *Aakon Construction Services and Pure Fitout Associated* [2021] 161 MCA at 77.

<sup>(2)</sup> *Ibid* at 80.

<sup>(3)</sup> *Ibid* at 83.

<sup>(4)</sup> *Ibid* at 94.

<sup>(5)</sup> The author suggests that any party serving notice should also be aware of the nine guiding principles for construction of a notice as set out by Barniville J, albeit in the context of a reference to arbitration, in *Bowen Construction Limited and Kelly’s of Fantane* [2019] IEHC 861 at 148.



# Adjudication process

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- The Courts recognise that, as in the UK, an adjudicator who engages in a ‘frolic of their own’ is likely to be in a breach of fair procedure and they further state that:

*“It should be emphasised, however, that the adjudication process is not iterative: an adjudicator is not required to enter into a dialogue with the parties, nor to provide the parties with an indication of his proposed findings. The adjudication process is intended to be expeditious, and the adjudicator is entitled to make use of his specialist knowledge where appropriate.”<sup>(1)</sup>*

*“Moreover, an adjudicator is not necessarily restricted to reaching a conclusion which coincides precisely with the position advocated for by one or other of the parties. Rather, the adjudicator can reach his own conclusions on the basis of the materials before him in respect of which the parties have had an opportunity to make submissions.”<sup>(2)</sup>*

- The Courts have re-affirmed their support to the process by stating that the adjudicator is entitled to make use of their specialist knowledge where appropriate.



# Failure to respond to a 'Payment Claim Notice'

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- The Courts advise that the provisions in respect of payment claim notices under the Construction Contracts Act 2013 are materially different to those under the UK legislation.

*“In particular, there is no express statutory provision under the Irish legislation which stipulates what the consequences of a failure to respond to a payment claim notice are to be.”<sup>(1)</sup>*

*“...the domestic legislation does not set out the consequences of a failure on the part of the paying party to deliver a response within the required time; and, secondly, it does not state that, in the absence of a response, the amount claimed in the payment claim notice is payable by default.”<sup>(2)</sup>*

*“This judgment does not, therefore, address the broader question of whether principles similar to those stated by the Court of Appeal in England and Wales in Grove Developments Ltd v. S & T (UK) Ltd should be applied to the Construction Contracts Act 2013. Any consideration of this broader question could only properly be carried out in substantive proceedings initiated in respect of the adjudicator’s decision.”<sup>(3)</sup>*

<sup>(1)</sup> Aakon Construction Services and Pure Fitout Associated [2021] 161 MCA at 43.

<sup>(2)</sup> Ibid at 49.

<sup>(3)</sup> Ibid at 124.

# Judicial Review

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- It has been held for some time that adjudication in Ireland under the CCA 2013, being a statutory process, could be subject to Judicial Review.

*“...whether the Oireachtas can have its intention, of introducing an alternative to litigation, thwarted by one party to an adjudication subjecting the adjudication process to litigation by the back door, i.e. by judicially reviewing the adjudicator’s decision?”<sup>(1)</sup>*

*“...the appropriate forum in which this issue is resolved is not by way of judicial review, but by way of challenge to the adjudicator’s decision as part of the enforcement proceedings.”<sup>(2)</sup>*

*“...it would be more appropriately dealt with by a private law remedy, which is provided by the challenge to the Adjudicator’s decision pursuant to the Order 56B enforcement proceedings, rather than by the public law remedy...”<sup>(3)</sup>*

- The K&J Townmore judgment confirms that the Court will not permit Judicial Review in advance of the issue of an adjudicator’s decision.

<sup>(1)</sup> K&J Townmore Construction Limited and Desland (Mechanical) Limited [2023] 874 JR at 4.

<sup>(2)</sup> Ibid at 38.

<sup>(3)</sup> Ibid at 76.

# Enforcement

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- The judicial discretion for enforcement proceedings “represents an important safeguard which ensures confidence in the statutory scheme of adjudication.”<sup>(1)</sup>

*“...provision is made under the Construction Contracts Act 2013 for an adjudicator’s decision to be enforced as if it were an order of court. An adjudicator’s decision thus has an enhanced status under the domestic legislation. By contrast, the normal procedure for enforcing an adjudicator’s decision under the UK legislation is to apply for summary judgment.”<sup>(2)</sup>*

*“The default position remains that the successful party is entitled to enforce an adjudicator’s decision **pro tem**, with the unsuccessful party having a right to reargue the underlying merits of the payment dispute in subsequent arbitral or court proceedings.”<sup>(3)</sup>*

*“One inevitable consequence of the existence of this judicial discretion is that parties, in an attempt to evade enforcement, will seek to conjure up breaches of fair procedures where, in truth, there are none....the discretion to refuse to enforce is a narrow one.”<sup>(4)</sup>*

(1) John Paul Construction and Tipperary Co-Operative Creamery [2021] 262 MCA at 10.

(2) Aakon Construction Services and Pure Fitout Associated [2021] 161 MCA at 21.

(3) John Paul Construction and Tipperary Co-Operative Creamery [2021] 262 MCA at 11.

(4) Ibid at 12.



# Summary

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- There are still some important points of principle that have yet to be settled through jurisprudence, where the Courts have advised that “...it is appropriate to proceed with caution.”<sup>(1)</sup>

*“The precise contours of the High Court’s discretion to refuse to enforce what is expressed under legislation to be a binding decision should be developed incrementally.”<sup>(2)</sup>*

*“The onus is upon the party resisting an application for leave to enforce an adjudicator’s decision to demonstrate that there has been an obvious breach of fair procedures such that it would be unjust to enforce the adjudicator’s decision, even on a temporary basis. The breach must be material in the sense of having had a potentially significant effect on the overall outcome of the adjudication.”<sup>(3)</sup>*

- The absence of a successful challenge to an adjudicator’s decision or failure to enforce an adjudicator’s decision demonstrates the continued support of the Courts to the adjudication process.

<sup>(1)</sup> Aakon Construction Services and Pure Fitout Associated [2021] 161 MCA at 21.

<sup>(2)</sup> Ibid at 21.

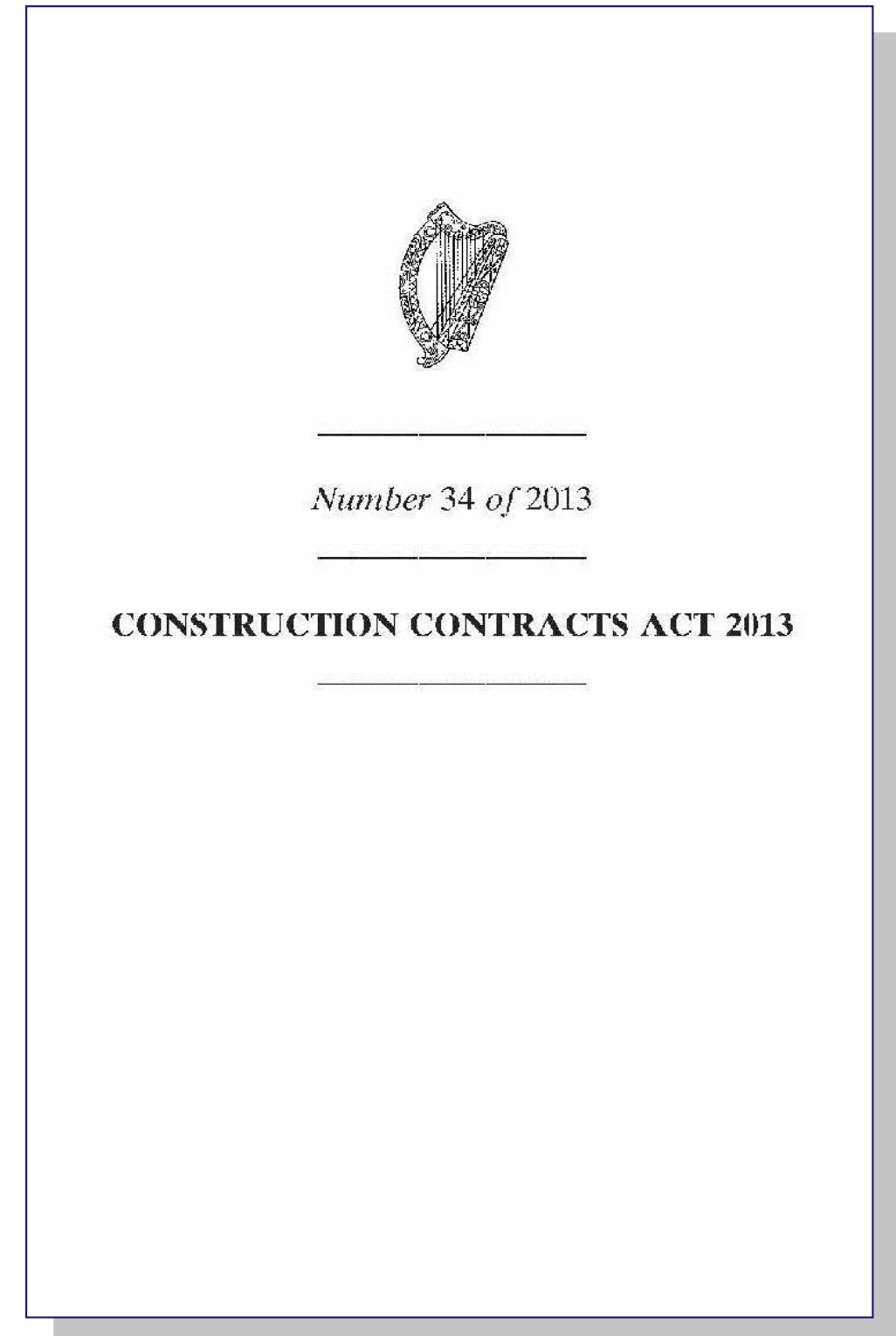
<sup>(3)</sup> DNCF Limited and Genus Homes Limited [2023] IEHC 40 at 48.

# To conclude

- The CCA 2013 has now been in place now for more than eight years.
- There is evidence that it is replacing the alternative dispute resolution processes of mediation, conciliation and in particular arbitration for the resolution of construction disputes.
- To date there has been no successful challenge to the enforcement of an adjudicator's decision, with circa 300 decisions having been issued.<sup>(1)</sup>
- Anecdotal evidence suggests that *'its bark is more effective than its bite'* in establishing and promoting payment discipline across the construction industry in Ireland, but that is the way it should be.
- Jurisprudence continues to develop incrementally.
- The past and continued support of the judiciary has been key.
- Just before enactment in 2016 it was said that:

*"Ireland has perhaps the best drafted construction adjudication law in the world"*<sup>(2)</sup>

- With hindsight may be a little exaggerated, but the Act is achieving what is set out to do.



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# Thank you



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